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No. . . - . . . .

IN THE

Supreme Court of the United States

October Term, 1982

DOUGLAS JAMES SCANLON,

Petitioner,

vs.

ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MARILYN HOLLE,*
DANIEL BRZOVIC,
Western Law Center for the Handicapped,
849 South Broadway, Suite M-22,
Los Angeles, California 90014
(213) 383-7285

MARY-LYNNE FISHER,
Loyola Law Clinics,
1441 West Olympic Boulevard,
P.O. Box 15019
Los Angeles, California 90015-3980

Attorneys for Petitioner.

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Court below erred in holding that § 504 of the Rehabilitation Act, 29 U.S.C. § 794, does not protect otherwise qualified handicapped individuals from employment discrimination unless providing employment is a primary objective of the federal aid.
2. Whether the Court below erred in not holding, as have the Third and Eleventh Circuits, that § 504 prohibits employment discrimination by federal grantees regardless of the purpose of the federal assistance.
3. Whether the Court below erred when it failed to follow the approach dictated by last term's North Haven Board of Education v. Bell, 456 U.S.

____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) when interpreting statutory language virtually identical to that considered in North Haven.*

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* The caption contains the names of all the parties.

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No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DOUGLAS JAMES SCANLON,

Petitioner,

vs.

ATASCADERO STATE HOSPITAL
and California Department
of Mental Health,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Douglas James Scanlon respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed and entered May 24, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 677 F.2d 1271 and is set forth in Appendix A. The opinion and order of the District Court for the Central District of California is unreported and is set forth in Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on May 24, 1982. A petition for rehearing and suggestion for rehearing en banc was filed on June 10, 1982, and denied on September 22, 1982. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1)

STATUTES INVOLVED

The statutes involved, 29 U.S.C. §§ 794 and 794a, and 29 U.S.C. § 2000d-3, are set forth as Appendix D.

STATEMENT OF CASE

Petitioner, Douglas James Scanlon, alleged in his complaint that he has diabetes mellitus which caused loss of vision in one eye. He was a graduate student at Cal Poly San Luis Obispo where he was seeking a degree as a recreaation major. During the Spring of 1977, he worked as a volunteer recreation therapist at Atascadero State Hospital in San Luis Obispo County. On February 6, 1978, plaintiff was interviewed for a salaried half-time, nine-month position as a graduate student assistant.

Petitioner Scanlon was offered the position subject to passing a pre-

employment physical. He failed the physical and was denied the job because of his handicaps - namely, diabetes and loss of vision in one eye. The job would have satisfied academic requirements for graduation.

Plaintiff, in his complaint, alleged that both respondents - Atascadero State Hospital and the California State Department of Mental Health, the state agency responsible for administering and supervising Atascadero - received federal financial assistance, and that the refusal to hire petitioner violated his rights under § 504 of the Rehabilitation Act, 29 U.S.C. § 794.

The respondents moved to dismiss the complaint on two grounds. First, they contended that § 504 of the Rehabilitation Act does not protect a qualified handi-

capped person against employment discrimination unless the Federal assistance was received for the purpose of providing employment. Second, the respondents argued that Mr. Scanlon's suit under § 504 was barred by the Eleventh Amendment to the Constitution.

The District Court rejected respondents' interpretation of § 504 and followed, instead, the reasoning of the district court in Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979). However, the District Court below granted the respondents' motion to dismiss the § 504 action and pendant state claims on the ground that the entire action was barred by the Eleventh Amendment.

In a divided opinion the Court of Appeals below summarily affirmed. The majority did not reach the Eleventh

Amendment issue, but, rather, affirmed dismissal on the ground that a private action under § 504 to redress employment discrimination cannot be maintained unless a primary objective of the federal assistance is to provide employment. In so holding, the majority adopted, without independent analysis, the holding and reasoning in Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

The Trageser court based its sua sponte holding on its reading of § 504 as originally enacted and on the 1978 amendments adding § 505, 29 U.S.C. § 794a. Section 505 made available to persons aggrieved under § 504 "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." The Trageser court found that § 505 incorpor-

ated the limitation in § 604 of Title VI, 42 U.S.C. § 2000d-3, into the enforcement of § 504. Section 604 barred federal agency or department enforcement actions with respect to employment discrimination on the basis of race "except where a primary objective of the Federal finanacial assistance is to provide employment." The court held that the limitation extended to private actions as well. Finally, the court found the limitations on the scope of § 504 protections excluding most employment discrimination claims to be consistent with § 504 as originally enacted. Apparently, since § 504's language was patterned after that of § 601 of Title VI, the § 604 limitations thereby attached.

Judge Ferguson in his dissent in Scanlon below first looked to the language and intent of § 504 of the Rehabilitation

Act. The language of § 504, bare of any words of limitation, proscribed employment discrimination by every recipient of federal financial assistance regardless of the purpose of the assistance by § 504's "subject to discrimination under" clause: "No otherwise qualified handicapped individual ... shall ... be subject to discrimination under any program or activity receiving Federal financial assistance." Further, the over-all goal of the Rehabilitation Act was employment of the handicapped. That goal was to be furthered by effective rehabilitation services and by removing barriers to equal employment opportuntiy. Given such an over-all goal, Judge Ferguson found odd a reading that Congress intended to condone discrimination by programs and activities it assisted through federal funds.

Judge Ferguson next looked to the 1978 amendments to the Rehabilitation Act adding § 505 and to § 505's legislative history. Judge Ferguson found that § 505 was intended to codify as a statutory requirement existing Department of Health, Education & Welfare (HEW) practice.

Finally, Judge Ferguson criticized Trageser. Even if § 505 incorporated the limitations of § 604 of Title VI, § 604 by its own language operates only as a limit to agency or department enforcement and therefore would not be applicable to private actions. Further, there was no indication that Congress, by enacting § 505, intended to deprive the handicapped of protection from employment discrimination. Also, the statutory schemes under the Rehabilitation Act and under the Civil Rights Act of 1964 differ. Even

were § 604 a limitation on both private and agency action, persons subjected to employment discrimination on the basis of race would have a remedy under Title VII, 42 U.S.C. § 2000e. With few exceptions, persons subjected to employment discrimination on the basis of handicap by a federal grantee would have no remedy.

REASONS FOR GRANTING THE WRIT.

I.

SUMMARY: THE CIRCUITS ARE IN CONFLICT OVER THE PROTECTION AGAINST EMPLOYMENT DISCRIMINATION AFFORDED BY § 504 OF THE REHABILITATION ACT. MOREOVER, THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISION LAST TERM IN NORTH HAVEN BOARD OF EDUCATION v. BELL

Scanlon below, together with the Second, Fourth, Seventh, and Eighth Circuits, all hold that § 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides no protection from discrimination against the handicapped by federally assisted programs unless a primary objective of the assistance is providing employment, or unless the employee is the intended or primary beneficiary of the federal assistance. The holdings in the Ninth Circuit below and in the Second, Fourth, Seventh and Eighth Circuits directly conflict with and are expressly rejected by holdings in the Third and Eleventh Circuits. Both the

Third and Eleventh Circuits hold that § 504 protects handicapped individuals from employment discrimination by federally assisted programs regardless of the objective of the assistance.

The court below failed to consider or follow this Court's reasoning and approach in North Haven Bd. of Ed. v. Bell, 456 U.S. ___, 102 S.Ct. 1912, 72 L.Ed. 2d 299 (1982), a case in which this Court interpreted language virtually identical to that of § 504. In North Haven, this Court held that the proscription against gender discrimination in education programs or activities receiving federal financial assistance under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, includes a proscription against employment discrimination. In so holding, the North Haven Court rejected an interpretation of Title IX which would have limited its

protections to only those who were the intended or primary beneficiaries of the federal assistance. The Third Circuit in LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (1982) did follow this Court's approach and reasoning in North Haven. The Third Circuit rejected an interpretation of § 504 which would have limited the scope of § 504 protections and which would have sanctioned the use of federal funds by programs and activities despite discrimination against the handicapped. The Third Circuit thus reached a conclusion like that in North Haven and directly contrary to the holding of the Ninth Circuit in Scanlon below.

II.

THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE SCOPE OF § 504 PROTECTION AGAINST EMPLOYMENT DISCRIMINATION

The Third Circuit in LeStrange, supra, squarely conflicts with the Fourth Circuit in Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (1978), together with Scanlon below and Trageser's other progeny in the Eighth and Second Circuits: Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (1980), and United States v. Cabrini Medical Center, 639 F.2d 908 (1981). LeStrange holds that employment discrimination against the handicapped by a federally assisted program or activity is proscribed by § 504 of the Rehabilitation Act, 29 U.S.C. § 794, regardless of the purpose of the federal assistance. Trageser, however, holds that employment discrimination against the handicapped by a federally assisted program is proscribed

by § 504 only (1) when providing employment is a primary objective of the federal aid, or (2) when discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid.

The Eleventh Circuit in Jones v. Metropolitan Atlanta Rapid Transit, 681 F.2d 1376 (1982), like the Third Circuit in LeStrange, also conflicts with and expressly rejects Trageser and its progeny. The holding in Jones is virtually the same as that in LeStrange. 1/

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1. In addition to showing that the employer receives federal aid, Jones requires the plaintiff to show "that he/she was an intended beneficiary of the assistance." Id., 681 F.2d at 1382. However, the citation of Doyle v. Univ. of Ala.-Birmingham, 680 F.2d 1323 (11th Cir. 1982), and Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981), makes clear that "intended beneficiary" as used in Jones means that the plaintiff has to show program specificity, some nexus between the the alleged discriminatee and the federally assisted program, and that it may not be enough to allege that the over-all entity received the funding. (On this

The Seventh Circuit in Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (1980) defined the scope of § 504's protection against employment discrimination somewhat differently than did Trageser and Scanlon below. Under Simpson, and like Trageser and Scanlon below, § 504 protections would extend to employment practices necessarily causing discrimination against the primary beneficiaries of the federal aid. Simpson in addition would look to § 504 to protect employees when they are the intended or primary

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1. (cont'd) point compare Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982). See also the discussion on program specificity in North Haven Bd. of Ed. v. Bell, supra, 456 U.S. at ____, 102 S.Ct. at 1926-27, 72 L.Ed.2d at 317-19.) As discussed infra, Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980), used the term "intended beneficiary" in a different sense - namely, to mean primary beneficiary of the federal financial assistance. Id., 629 F.2d at 1234

beneficiaries of a federally assisted program.[2] There would appear to be no substantive difference between § 504 employment discrimination protections defined as limited to employees when they are the intended or primary beneficiaries of federal asssistance, and those § 504 protections defined as limited to employees when providing them employment is a primary objective of the federal assistance.[3] The lack of substantive

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2. This is how Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), and cases following Islesboro defined the scope of protection against employment discrimination afforded by § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). The Isleboro definition was rejected by this Court in North Haven Bd. of Ed. v. Bell, 456 U.S. ____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982).

3. However, an Eighth Circuit case decided after Carmi, supra, suggests a difference in application between the scope of § 504 protection against employment discrimination under the Trageser line of cases and under Simpson. In Simon v. St. Louis County, Mo., 656 F.2d 316 (8th Cir. 1981), the court held in effect that receipt of

difference between the two formulations of the § 504 scope-of-protection test is reflected in the Trageser formulation. Trageser would protect employees from discrimination on the basis of handicap even when providing employment was not a primary objective of the federal assistance if such discrimination necessarily caused discrimination against the primary beneficiaries - that is, Trageser would protect employees under certain circumstances even when they were not the primary beneficiaries of federal aid.

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3. (cont'd) federal assistance to enable a jurisidiction to hire more police officers or to pay police officer salaries meant that providing employment was a primary objective of the federal aid. Thus Simon would not limit § 504 protections to participants in job training programs, but rather would include within the scope of § 504's protections anyone whose salary was paid or payable in part through federal assistance. Simon in its attempt to expand the protections of § 504 within the straitjacket of Carmi has defined "primary objective" to include the means to the objective.

In sum, this Court needs to resolve the conflict between the Second, Fourth, Seventh, Eighth and Ninth Circuits on the one hand, and the Third and Eleventh Circuits on the other, with respect to the scope of protection § 504 provides the handicapped against employment discrimination by federally assisted programs and activities. Further, the conflict is ripe for resolution by this Court in that the question of the scope of § 504 protection against employment discrimination has not only been exhaustively considered at the circuit and district court level,[4/] but also by commentators[5/] and

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4. The question has been considered by district courts in almost every circuit. Second Circuit: Doe v. Syracuse School Dist., 508 F.Supp. 333 (N.D. N.Y. 1981); Whitaker v. Bd. of Higher Ed. of the City of N.Y., 461 F.Supp. 99 (E.D. N.Y. 1978).

Third Circuit: Sabol v. Bd. of Ed. of Township of Willingboro, County of Burlington, 510 F.Supp.

the Department of Justice, the agency which since 1980 has had the responsibility for coordinating the enforcement of § 504.[6]

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4. (cont'd) 892 (D. N.J. 1981); Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978); Drennon v. Philadelphia General Hosp., 488 F.Supp. 809 (E.D. Pa. 1977).

Fourth Circuit: Hall v. Board of County Comr's of Frederick County, 509 F.Supp. 841 (D. Md. 1981); Proffitt v. Consolidation Coal Co., 21 F.E.P. Cases 382 (S.D. W.Va. 1979).

Fifth Circuit: Miller v. Abilene Christian Univ. of Dallas, 517 F.Supp. 437 (N.D. Tex. 1981); Guertin v. Hackerman, 496 F.Sup 593 (S.D. Tex. 1980).

Ninth Circuit: Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979); Upshur v. Love, 474 F.Supp. 332 (N.D. Cal. 1979).

Tenth Circuit: Cain v. Archdiocese of Kansas City, 508 F.Supp. 1021 (D. Kan. 1981).

Eleventh Circuit: Brinkley v. Dept. of Public Safety, 22 F.E.P. Cases 164 (N.D. Ga. 1980); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977).

5. E.g., Comment, "Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action," 54 N.Y.U.L. Rev. 1173 (1979); Note, "Employment Discrimination under § 504 of the Rehabilitation Act: Trageser v. Libbie Rehab. Center, Inc.," 21 Boston Coll. L. Rev. 1178 (1980).

6. By Executive Order 12250 (1980), the Attorney General was given responsibility for coordinating the enforcement of § 504 by federal

III.

THE COURT BELOW ERRED WHEN IT FAILED TO FOLLOW THE APPROACH DICTATED BY LAST TERM'S NORTH HAVEN WHEN INTERPRETING STATUTORY LANGUAGE VIRTUALLY IDENTICAL TO THAT CONSIDERED IN NORTH HAVEN. THE NORTH HAVEN APPROACH WOULD HAVE COMPELLED A FINDING THAT § 504 PROHIBITS EMPLOYMENT DISCRIMINATION BY FEDERAL GRANTEES

Last term this Court in North Haven Bd. of Ed. v. Bell, 456 U.S. ____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) considered whether the proscription against gender discrimination in education programs and activities receiving federal assistance under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681,

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6. (cont'd) agencies and departments. In his comments to the regulations promulgated pursuant to that authority (28 C.F.R. §§ 42.501-.540 (1980)), the Attorney General analyzed the scope of protection afforded by § 504 with respect to employment discrimination and rejected Trageser. 45 Fed. Reg. 37620, 37627-8 (1980).

includes a proscription against employment discrimination. This Court concluded that § 901(a) of Title IX covers employment. The language of § 901(a)[7] and § 504 are virtually identical since both § 901(a) and § 504 of the Rehabilitation Act, 29 U.S.C. § 794, are patterned after § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. It follows, then, that this Court's approach in analyzing § 901(a) of Title IX is the approach to be used in analyzing § 504 of the Rehabilitation Act. Using the North Haven approach compells a conclusion like that in North Haven: that the general

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7. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

proscription against discrimination on the basis of handicap by federally assisted programs includes a proscription against employment discrimination regardless of the objective of the assistance.

A. The first step in the North Haven approach - looking to the language of § 504 itself mindful of § 504's civil rights origins - compells a finding that employment discrimination is proscribed by § 504.

Section 504, like § 901(a) of Title IX, is a remedial, civil rights statute in origin, and therefore must be accorded a "'sweep as broad as its language.'" North Haven Bd. of Ed. v. Bell, supra, 456 U.S. at ____, 102 S.Ct. at 1917-18, 72 L.Ed.2d at 308. Therefore, just as the term "person" in § 901(a) of Title IX was found by the North Haven court to include employees, so too the term "otherwise qualified handicapped

individuals" in § 504 includes employees. Just as the North Haven court found the phrase "subject to discrimination under" as used in § 901(a) reached beyond pro-gram beneficiaries to include employees who neither particiapated in nor directly benefited from the federally assisted program (Id., 456 U.S. at ____, 102 S.Ct. at 1917, 72 L.Ed.2d at 308), so too the same phrase in § 504 includes employees who are neither the program's intended beneficiaries nor are provided employment as a primary objective of the federal assistance. Therefore the scope of protection against handicap employment discrimination by federal grantees is coextensive with the scope of the federally assisted program or activity - unless there are other considerations counseling to the contrary:

> "Because [§ 504] neither expressly nor impliedly excludes employees from its reach, we should interpret the provisions as covering and protecting these ['individuals'] unless other considerations counsel to the contrary. After all, Congress easily could have substituted 'student' or 'beneficiary' for the word ['individual'] if it had wished to restrict the scope of [§ 504]."

From North Haven Bd of Ed. v. Bell, supra, 456 at ____, 102 S.Ct. at 1918, 72 L.Ed. 2d at 308.

B. After finding employees included within § 504's "otherwise qualified handicapped individual", the North Haven approach then looks to whether there are other considerations counseling to the contrary.

Neither the 1978 amendments adding § 505(a)(2), 29 U.S.C. § 794a(a)(2),[8/] nor the legislative history of either § 504 or § 505(a)(2), are considerations

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8. Pub. L. No. 95-602, 92 Stat. 2955 (1978).

counseling to an interpretation of § 504 limiting the sweep of its language and limiting its protections against employment discrimination. The Rehabilitation Act in its entirety and the Act's legislative history evidences ongoing Congressional concern about the obstacles to employment faced by persons with disabilities and Congress' intention to eliminate these obstacles by means ranging from vocational training programs to affirmative action by the government and its contractors in hiring the handicapped.

1. Section 504's legislative history indicates no Congressional intent to limit the scope of § 504 and therefore is not a consideration counseling to the contrary.

Prior to inclusion of § 504 in the Rehabilitation Act of 1973 and its vetoed

precursors,[9] attempts were made to enact § 504 by amending Title VI.[10] Although the attempt ws abandoned once § 504 was incorporated into the precursors of the Rehabilitation Act, statements by the introducers indicate equal employment opportunity was an important objective. Representative Charles A Vanik, in introducing H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. at 45,975 (1971) noted:

> "My proposed legislation will insure equal educational and employment opportunities for

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9. The Senate version of the Rehabilitation Act of 1972, S.3987, 92d Cong., 2d Sess. (1972), was the first to include § 504. S.3987 and its later version, S.7, 93d Cong., 1st Sess. (1973). were both vetoed by President Nixon though for reasons unrelated to § 504.

10. H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45,945 and 45,974-75 (1971) (introduced by Rep. Vanik); S. 3044, 92d Cong., 2d Sess. (1972), 118 Cong. Rec. 525-26 (1972) (introduced by Senators Humphrey and Percy).

> the handicapped by making discrimination illegal in federally assisted programs and activities." (emphasis added)

Similarly Senator Humphrey, in introducing S. 3044 on the Senate side, 92d Cong., 2d Sess., 118 Cong. Rec. 525-26 (1972), indicated that the proposed amendment would address injustices confronted by the handicapped in being denied fair wages for work, or in experiencing the discriminatory effect of job qualification questionnaires or employment procedures. A companion statement by Senator Percy, 118 Cong. Rec. 526 (1972), also expressed concern about equal employment opportunity:

> "This landmark legislation, introduced by Congressman Vanik in the House, would prohibit discrimination against the mentally and physically handicapped in programs which receive federal aid.
>
> * * * * * *

> "The amendment we are introducing today would ... [guarantee] the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse and degradation."

The legislative history of the Rehabilitation Act of 1973 and its two vetoed predecessors indicate § 504 was intended to cover employment by federal grantees without regard to the purpose or objective of the federal assistance. Congress simply did not intend that federal monies support employment discrimination by federal grantees. See the discussion of the legislative history of § 504 in LeStrange v. Consolidated Rail Corp., 687 F.2d 767, 772-74 (3d Cir. 1982), and in Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d

1376, 1380-81 (11th Cir. 1982).[11]

2. Section 505 was added to expand rights, not narrow the scope of rights under § 504, and therefore neither § 505 nor its legislative history are "considerations [which] counsel to the contrary.

In 1978 § 505 was added to the Rehabilitation Act, 29 U.S.C. § 794a.[12] Section 505(a)(2) made the rights, remedies and procedures of Title VI

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11. The legislative history of the 1974 Amendments to the Rehabilitation Act, Pub. L. No. 93-651, 88 Stat. 1617 (1974), also indicate § 504 had been enacted "to prevent discrimination against handicapped individuals ... in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided programs." (emphasis added) Sen. Rep. No. 93-1297, 120 Cong. Rec. 30534 (1974), reprinted in [1974] U.S. Code Cong. and Admin. News, 6373, 6388. The original definition of handicapped individual in § 7(6) of the Act was amended in 1974 due to Congressional concern that, in the context of § 504, the original definition would lead to an overemphasis on employment discrimination to the exclusion of other forms of discrimination comprehended by § 504. Id. at 120 Cong. Rec. 30534.

12. Pub. L. No. 95-602, 92 Stat. 2955 (1978).

of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, available to persons aggrieved under § 504. The nondiscrimination provisions of Title VI are set out in § 601, 42 U.S.C. § 2000d. Section 604 of Title VI, 42 U.S.C. § 2000d-3, bars department or agency enforcement actions with respect to employment discrimination "except where a primary objective of the Federal financial assistance is to provide employment." "Section 604, as a substantive restriction ..., does not constitute a right, remedy or procedure. Thus, under the plain meaning of the language in Section 505, Section 604 of the Civil Rights Act was not incorporated into the Rehabilitation Act." Jones v. Metropolitan Atlanta Rapid Transit Authority, supra, 681 F.2d at 1380-81. Further, even if § 604 had any applicability to

§ 504, § 604 would have no effect on private actions under § 504 since § 604's restrictions are limited to government enforcement actions.

The legislative history of § 505 indicates a Congressional intent to reaffirm and strengthen the private right of action under § 504, and to codify then existing Department of Health, Education & Welfare (HEW) procedures and regulations. 13/

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13. See H.R. 95-1149, 124 Cong. Rec. (1978), reprinted in 1978 U.S.Cong. and Admin. News, 7312, 7332; Sen Rep.No. 95-890, 95th Cong., 2d Sess. 19 (1978); 124 Cong. Rec.S. 15591 (Sept. 20, 1978). See also discussion in Scanlon below, 677 F.2d 1271, 1274-1275 and in Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1380-82 (11th Cir. 1982).

3. Administrative interpretations of § 504 consistently prohibit handicap employment discrimination regardless of the purpose of the federal assistance and therefore are not "considerations [which] counsel to the contrary.

The administrative agencies promulgating regulations to enforce § 504 have uniformly taken the position that discriminatory employment practices are prohibited under § 504 regardless of the targeted purpose of the federal assistance.[14] HEW, the agency given original responsibility for coordinating enforcement of § 504, has consistently maintained that

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14. E.g., Health & Human Services, 45 C.F.R. § 84.11 (1981); The Department of Justice, 28 C.F.R. § 42.510 (1981); The Small Business Administration, 13 C.F.R. § 113.3 (1982); The Department of the Treasury, 31 C.F.R. § 51.55 (1982); The Department of Transportation, 49 C.F.R. § 27.31 (1981).

§ 504 prohibits discriminatory employment practices regardless of the objective of the federal funds.[15] The legislature knew and approved of HEW's interpretation and practice.[16]

Similarly, the Department of Justice, currently assigned the responsibility for coordinating enforcement of § 504 by Executive Order 12250 (1980), has analyzed, and rejected, the Trageser interpretation limiting enforceability of § 504 to cases in which the employer received funds targeted for employment purposes. The

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15. 41 Fed. Reg. 29,548 (1976); 42 Fed. Reg. 22,676 (1977); 44 Fed. Reg. 17,174 (1979).

16. Sen. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

Department of Justice reviewed the legislative history of the Rehabilitation Act and its amendments, HEW's administrative construction, the remedial nature of § 504, and the legislative history of § 505 before rejecting the Trageser analysis.[17]

C. The Third Circuit in LeStrange followed the approach dictated by North Haven in analyzing § 504, and held that § 504 covers employment discrimination regardless of the purpose of the federal funding.

In LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3d Cir. 1982), the court noted

> "[T]he crucial issue is whether § 504, as amended in 1978, covers employment discrimination against

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17. 45 Fed. Reg. 37627-8 (1980). The Department of Justice's analysis was quoted extensively at note 4 of Judge Ferguson's dissent below.

> the handicapped by federal grantees.
>
> "The Supreme Court recently confronted this same issue within the context of Title IX of the Education Amendments of 1972, and we believe its approach in North Haven Board of Education v. Bell, [456 U.S. ___, 72 L.Ed.2d 299, 102 S.Ct. 1912] (1982), dictates our approach in this case." Id., 687 F.2d at 769.

The Third Circuit followed the North Haven approach and concluded that the broad words of § 504 cover a private suit for employment discrimination, and that no contrary considerations exist to narrow the scope of protection to those instances where the federal funds were targeted for employment purposes.

IV.

THE COURT BELOW ERRED WHEN IT CONSTRUED LANGUAGE CONTRARY TO HOW VIRTUALLY IDENTICAL LANGUAGE WAS CONSTRUED IN NORTH HAVEN.

As set out and discussed in Section III above at pages 21-24, the language of § 504 is virtually identical to the language of § 901(a) of Title IX which was construed by this Court in North Haven Bd. of Ed. v. Bell, supra. North Haven compels a finding that § 504 prohibits federal grantees from employment discrimination on the basis of handicap without regard to the objective or purpose of the federal assistance. Further, the interpretation of § 504 advanced by the court below and by the Second, Fourth, Seventh and Eighth Circuits, is virtually the same as the interpretation of § 901(a) rejected by this Court in North Haven.

North Haven rejected a line of cases which began with Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 44 U.S. 972 (1979). Islesboro limited § 901(a)'s protections to the beneficiaries of federal assistance - i.e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the U.S. government. Id. at 426. Similarly, Romeo Community Schools v. HEW, 600 F.2d 581, 584 (6th Cir.), cert. denied, 444 U.S. 972 (1979), the court concluded Title IX "reaches only those types of disparate treatment" that involves discrimination against program beneficiaries. Accord, Seattle University v. HEW, 621 F.2d 992 (9th Cir. 1980), vacated ____ U.S. ___, 102 S.Ct. 2264 (1982). North Haven at the district

court level had held that Title IX does not deal with sex discrimination against employees of educational institutions, but was "enacted to prohibit discrimination against students who are the intended beneficiaries of federal assistance to education." North Haven affirmed the court of appeals' rejection of that interpretation of Title IX.

V.

THE SCOPE OF § 504'S PROTECTION AGAINST EMPLOYMENT DISCRIMINATION IS AN IMPORTANT AND RECURRING QUESTION AFFECTING MILLIONS OF EMPLOYABLE HANDICAPPED PERSONS, MOST OF WHOM ARE WITHOUT REMEDY UNDER STATE LAW.

When the Rehabilitation Act was amended in 1978, the number of unemployed among employable handicapped persons nationwide was estimated at seven and a half million.[18] In the petitioner's own state of California, recent statistics indicate there are over one million persons with disabilities who are capable of working.[19] Yet sixty-five per cent of working age disabled in California are unemployed or have never

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18. 124 Cong. Rec. H3971 (daily ed., May 16, 1978).

19. Note, "Prohibiting Employment Discrimination on the Basis of Disability: The Need to Expand California Law," 14 Univ. of Calif., Davis, L. Rev. 731 (1981)

entered the labor force.[20/] These statistics indicate that prejudice and discrimination against the handicapped as employees bar many qualified individuals from becoming self-sufficient members of the workforce.

In § 504 of the Rehabilitation Act, Congress established that the handicapped were a class protected against discrimination by recipients of federal funds. Section 504 provides one of the few avenues of redress available to qualified, employable handicapped individuals who are victims of employment discrimination solely because they are handicapped. A segment of employers who are federal contractors and subject to the affirmative action obligations of § 503 of the Rehabilitation Act, 29 U.S.C. § 793,

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20. Id. at 731-32

are also recipients of federal financial assistance and therefore subject also to the nondiscrimination obligations of § 504. Now that the majority of the circuits have held that there is no private right of action under § 503, § 504 has become increasingly important as a remedy for employment discrimination with respect to these § 503 and § 504 covered employers.

The class of handicapped persons protected by § 504 was intended to be broad. The Act defines a handicapped person protected by § 504 as any individual who has a physical or mental impairment which substantially limits major life activity; any person who has a record of such an impairment; or, any person who is regarded as having such an

impairment.[21] Given the broad sweep of § 504 and given entrenched employer prejudice confronting persons with disabilities, it is not surprising that seventy percent of the complaints brought under § 504 concern employment discrimination.[22]

In contrast to federal law which offers a broad, nationally applicable source of protection to handicapped victims of employment discrimination by recipients of federal assistance, state law offers an inadequate patchwork of protections.[23] Some states have no laws whatsoever prohibiting discrimination on the basis of disability. Further state

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21. 29 U.S.C. § 706(7)(B)

22. Hearings on Implementation of Section 504 before the Select Subcommittee on Education and Labor of the Senate Committee on Labor and Human Resources, 95th Cong., 1st Sess. 303 (1977), testimony of David Tatel, HEW Office for Civil Rights.

law protections vary widely in scope. Some are limited to public employers. Others narrowly define the class of persons protected, often excluding those whose impairment is mental. Still others are merely policy statements devoid of enforcement mechanisms.[24]

Faced with the inadequacy of state law, persons with disabilities have turned to federal law for protection. But, under the decision of the court below, § 504 becomes virtually devoid of any substance as a protection against employment discrimination. With the exception of a narrow class, the handicapped are deprived of a remedy which should be available to them under the broad remedial wording

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23. Note, "Potluck Protections for Handicapped Discriminatees," 8 Loyola U. of Chicago L. J. 814 (1977).

24. Id.

of § 504. The decision of the Court below will have a devastating impact on the rights of substantial numbers of employable handicapped persons. The importance of the issue necessitates review by this Court.

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Dated: November 22, 1982

Respectfully submitted,

MARILYN HOLLE
MARY-LYNNE FISHER
DANIEL BRZOVIC

Marilyn Holle

Attorneys for Petitioner

assistance by
BRIDGET ROWAN
Harvard Law School
Class of 1983

APPENDIX

APPENDIX A

Douglas James SCANLON,
Plaintiff-Appellant,

v.

ATASCADERO STATE HOSPITAL,
CALIFORNIA DEPARTMENT OF MENTAL
HEALTH, Defendants - Appellees.

No. 80-5201.

United States Court of Appeals
Ninth Circuit

Argued Sept. 15, 1981

Submitted Oct. 15, 1981.

Decided May 24, 1982.

Plaintiff, who suffered from diabetes and lack of vision in one eye, brought suit alleging that he was denied a job as graduate assistant at hospital in violation of section of Rehabilitation Act and various California statutes. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., dismissed the action, and plaintiff appealed. The Court of Appeals, Duniway, Circuit Judge, held

that: (1) order was appealable, and (2) complaint did not state claim upon which relief could be granted.

Affirmed.

Ferguson, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Central District of California.

Before DUNIWAY and FERGUSON, Circuit Judges, and KELLAM, District Judge.

DUNIWAY, Circuit Judge: We affirm the dismissal of this action, brought under 29 U.S.C. § 794.

I. FACTS.

Scanlon alleges that he suffers from diabetes mellitus and a lack of vision in one eye, that he was denied a job as a graduate student assistant at Atascadero State Hospital, and that this was discrimination in employment

contrary to § 504 of the Rehabilitation Act, 29 U.S.C. § 794 and to various California statutes. The hospital moved for dismissal of the complaint, arguing (a) that § 794 does not apply to employment discrimination unless a primary objective of the federal financial assistance is to provide employment, and (b) that Scanlon's claims were barred by the Eleventh Amendment. The district court rejected argument (a) but accepted argument (b), and on that ground dismissed the § 794 claim and the pendent state claims.

II. Appealability of the Order

The court's order merely dismissed the complaint; there is no judgment dismissing the action. Ordinarily, an order granting a motion to dismiss under rule 12(b)(6), F.R.Civ.P., carries with it a right to amend under rule 15(a),

and thus is not an appealable final judgment. Here, however, the ruling was on a ground not curable by amendment, and it is clear that the court intended to dispose of the action. See Scott v. Eversole Mortuary, 9 Cir., 1975, 522 F.2d 1110, 1112. The order is appealable. However, the better practice would have been to enter a judgment of dismissal.

III. The Merits.

We affirm on the ground that the complaint does not and cannot state a claim upon which relief can be granted. We do not reach the question of the applicability of the Eleventh Amendment. Title 29 U.S.C. § 794 now reads in pertinent part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section

> 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

In Trageser v. Libbie Rehabilitation Center, Inc., 4 Cir., 1978, 590 F.2d 87, 89, the Fourth Circuit decided that a private action under § 794 to redress employment discrimination cannot be maintained unless a primary objective of the federal financial assistance is to provide employment. The Second and Eighth Circuits have followed. United States v. Cabrini Medical Center, 2 Cir., 1981, 639 F.2d 908; Carmi v. Metropolitan St. Louis Sewer District, 8 Cir., 1980, 620 F.2d 672. See also Simpson v. Reynolds Metals Co., Inc.,

7 Cir., 1980, 629 F.2d 1226, 1232, 1234. For the reasons stated in Trageser, supra, we conclude that the order appealed from is correct.

Affirmed.

FERGUSON, Circuit Judge, dissenting:

My analysis of the Rehabilitation Act of 1973, of the 1978 Amendments to that Act, and of the legislative and administrative material which should guide our interpretation of that Act convinces me that the majority's decision in this case in in error. Accordingly, I dissent.

The issue in this case is whether Congress, by amending the Rehabilitation Act to "make available" the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964,"[1] actually limited, in a drastic way, the remedies that were already available to persons aggrieved under

§ 504 of the Act. No support for such a view can be found in the Act, in the 1978 Amendments, or in the relevant legislative and administrative materials. Indeed, the only support that exists is the decision of the Fourth Circuit in Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1979). Neither that decision, nor those of the other courts that have followed it, can withstand scrutiny. The Trageser decision has been criticized by the Senate Committee on Labor and Human Resources,[2] by HEW,[3] by the Department of Justice,[4] and by commentators.[5] It should not be followed by this court.

I. BACKGROUND

A. The Rehabilitation Act.

Section 504 of the Act prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance." 29 U.S.C.

§ 794. Prior to the enactment of the 1978 Amendments, this section had been held to create a private right of action for individuals aggrieved by employment discrimination on the basis of handicap. See, e.g., Whitaker v. Board of Higher Education, 461 F. Supp. 99, 106-08 (E.D.N.Y.1978); Drennon v. Philadelphia Gen. Hosp., 428 F.Supp. 809, 815-16 & n.6 (E.D.Pa.1977). The Department of Health, Education and Welfare had issued regulations implementing § 504 which prohibit employment discrimination against the handicapped by all recipients of federal financial assistance. E.g., 45 C.F.R. § 84.11 (1977).[6] HEW also noted, in the analysis of its regulations, the existance of case law holding that § 504 creates a private right of action. 45 C.F.R. § 84 App. A. subpar. 8 (1977). The conclusion reached by all of these authorities, that § 504 proni-

bits employment discrimination against the handicapped by every recipient of federal financial assistance, is supported by the language and clear intent of the Act itself. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (emphasis added). Notably, the statute does not read "... or be subject to discrimination other than employment discrimination," not does it include any words of limitation characterizing the purpose

which the federal funding must have before the rights guaranteed by § 504 are available. Furthermore, a primary focus of the Rehabilitation Act was employment for the handicapped. Its purpose was "to see that these [handicapped] individuals do receive the services that they need, particularly that maximum efforts are made to develop a vocational goal for them." S.Rep. No. 318, 93d Cong., 1st Sess. 18, reprinted in [1973] U.S.Code Cong. & Ad. News 2076,2092. The achievement of that goal is plainly impeded by the existence of discriminatory hiring practices in either the public or the private sector, and it would be odd indeed for Congress to condone such discrimination in programs administered with the help of federal funds.

B. The 1978 Amendments and Title VI

The courts recognized, under Cort

v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), that Congress had intended a private right of action to enforce the substantive rights specified in § 504.[7] Lloyd v. Regional Transp. Authority, 548 F.2d 1277, 1284-87 (7th Cir. 1977). However, the 1973 Act did not spell out federal department and agency procedures adequate to secure the enforcement of the rights it guaranteed, and federal agencies were slow to enforce those rights. See Comment, "Employment Discrimination Act Against the Handicapped," 54 N.Y.U.L. Rev. 1173, 1192 (1979) [hereinafter cited as "Employment Discrimination"]. See also Linn, "Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination against Handicapped Individuals," 27 De Paul L.Rev. 1047 (1978). As a result, first Congress, and then President Ford, directed federal agencies to

to promulgate enforcing regulations. "Employment Discrimination," supra, at 1192. The resulting regulations did not distinguish among federally funded programs on the basis of the purpose of the federal funding. Instead, employment discrimination against the handicapped is prohibited in all such programs. See, e.g., 45 C.F.R. § 84.11 (1977). Congress subsequently enacted the 1978 amendments, which were intended to codify as a statutory requirement the "existing HEW practice" embodied in its regulations at 45 C.F.R. parts 84,85. S.Rep.No. 890, 95th Cong., 2d Sess. 19 (1978), U.S. Code Cong. & Admin.News 1978, p. 7312. As already noted, the language of that enactment "made available" the procedures of Title VI to aid in the enforcement of § 504.

Title VI, which prohibits racial

discrimination in federally funded programs, provides as its most dramatic remedy a cutoff of federal funds to an offending program. 42 U.S.C. § 2000d-1. Title VI also contains a provision which limits enforcement by a federal agency or department in the event of employment discrimination based on race: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." Section 604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3.

The principal issue presented to us today is whether the 1978 Amendments in addition to explicitly making avail-

able to § 504 claimants the remedies of Title VI, also carried over the limitation on Title VI remedies effectuated by § 604. The crucial secondary issue concerns the proper scope of that limitation in the § 504 context, if indeed it was carried over at all by the 1978 Amendments. The Trageser court held that the § 604 limitation is broad enough in its customary Title VI field of action to cut off all remedies available under Title VI when it applies at all. It held that the limitation was carried over in the same broad form by the 1978 Amendments, and concluded that, as amended, § 504 provides no remedy for employment discrimination unless the federal funding is provided for the purpose of an employment program.

Analysis shows that the Trageser court was wrong in each step of its

syllogism. Trageser is wrong in its broad construction of § 604 in the Title VI context, wrong that the § 604 limitation was carried over to the Rehabilitation Act by the 1978 Amendments, and wrong in its conclusion that there is no remedy under § 504 for discrimination against the handicapped in a program receiving federal funds unless the purpose of those funds is for an employment program.

II. THE TRAGESER INTERPRETATION OF THE 1978 AMENDMENTS IS INCORRECT.

A. The Section 604 Limitations to Title VI Remedies Does Not Limit the Private Right of Action for Race-Related Employment Discrimination.

When Title VI was enacted, its sponsors clearly perceived the crucial distinction between the substantive right

it codified and the remedy it provided. That substantive right, which belongs to individuals, can be remedied by private or administrative action.

> Senator Humphrey emphasized that individuals can go to court to enforce their rights and that the remedy of funding termination was simply one method for enforcing Title VI rights - "the method for ... governmental agencies and activities covered by [the statute]. Senator Case supported Senator Humphrey's view that the substantive rights established in Title VI "are not limited by the limiting words of [its remedial provisions]."

Employment Discrimination, supra, 54 N.Y.U.L.Rev. at 1189, citing 110 Cong. Rec. 5255 (1964) (emphasis added). In-

deed, that distinction is plain on the face of § 604. If Congress had intended by § 604 to eliminate all remedies under Title VI for employment discrimination except where the purpose of the federal funding is employment, it could simply have legislated that nothing in Title VI "shall be construed to authorize action under this subchapter with respect to any employment practice... ." But that is not what § 604 says. It says that nothing in Title VI "shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice... ." 42 U.S.C. § 2000d-3 (emphasis added). The Trageser court, without any analysis, simply read these words out of the statute.[8] The Ninth Circuit has never ruled on this question. I am not persuaded that we should defer to the "reasoning" of

the Trageser court on this point, because I do not find any reasoning in Trageser on this point. I would adhere to the plain language of the statute, and hold that the § 604 limitation on Title VI only applies to enforcement actions by federal agencies and departments. When § 604 is read in this way, it is clearly not a bar to the present action, even if, as I doubt, its limitation is to be applied to actions under the Rehabilitation Act.

B. The 1978 Amendments Did Not Make the § 604 Limitation on Title VI Enforcement Applicable to § 504.

The language of § 120(a) of the 1978 Amendments gives no clue that Congress believed it was limiting the existing remedies under § 504. It simply makes no sense that by using language which purports to "make available" the

remedies of Title VI, Congress actually intended to deprive the handicapped of a crucial remedy. The Trageser court, in an apparent attempt to sidestep this obvious objection to its analysis, opined that rather than withdrawing any previously available remedies, the 1978 Amendment "simply confirms a plausible reading of § 504 as originally enacted."[9] 590 F.2d at 89. I doubt that the reading proposed by the Trageser court is plausible even when nothing but the bare language of the 1978 Act is considered.[10] When the legislative and administrative gloss reviewed above is considered, the Trageser reading of the original statute is utterly implausible.

Aside from the clear language of the amendment, there is another reason to doubt that Congress meant to limit § 504 in the way Trageser concludes it

did. The limitation of § 604 does not deprive persons aggrieved under Title VI of a remedy. Victims of racially based employment discrimination will still have a remedy under Title VII, unless the employer in question has fewer than fifteen employees. 42 U.S.C. § 2000e-2(a)(1), 2000e(b). Those left unprotected by Title VII may still have a private action under Title VI.[11] See Cannon v. University of Chicago, 441 U.S. 677, 710-16, 99 S.Ct. 1946, 1964-67, 60 L.Ed. 2d 560 (1979); Comment, "Employment Discrimination," supra, N.Y.U.L.Rev. at 1185-91. In contrast, Title VII does not cover handicap discrimination, so the only federal remedies available are those provided by the Rehabilitation Act. The Trageser doctrine leaves victims of employment discrimination without any federal remedy at all.

The legislative history of Title

VI - which was commonly referred to as the "cut-off-the-funds title" - shows clearly that Congress was anxious not to endanger important federal programs by an over-liberal use of this drastic remedy when other remedies for racially based employment discrimination were readily available. See, e.g., Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong. 2d Sess. 379-80 (1964) (Remarks of Rep. Poff); id. at 197-200, 228 (Remarks of Rep. Avery). Congress tempered the remedies of its anti-discrimination legislation to preserve the goals of other important federal programs. By reading § 604 to exclude all remedies, rather than simply agency action, and then importing this broadened exclusion into the Rehabilitation Act, the Trageser "reasoning" makes a mockery of Congress's careful and measured

approach.

This point was well put by Judge McMillian, concurring in Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980). He wrote:

> Even if § 604 is interpreted to restrict individual actions under Title VI, it does not follow that a similar restriction exists on individual actions under the Rehabilitation Act, which encompasses a different kind of statutory scheme than the Civil Rights Act of 1964... . In the Civil Rights Act of 1964, the restriction of individual actions under Title VI merely means that individuals must proceed under Title VII against employment discrimination based on race, national origin, or religion. Under the Rehabilitation Act, restriction

> of individual actions under § 794a (a)(2) would deny any remedy at all to many victims of discrimination.

Id. at 679-80 (McMillian, J., concurring). In the context of Title VI, § 604 operates to circumscribe, in a considered way, the choice of remedies available for discrimination in violation of that title. In the context of § 504 of the Rehabilitation Act, applied Trageser-style, § 604 operates as a blunderbuss. As Judge Orrick noted in Hart v. County of Alameda, 485 F.Supp. 66, 72 (N.D.Cal.1979), "there is not a single word of legislative history to support [an inference that Congress intended to restrict the scope of Section 504 by importing the restrictions of Section 604]; indeed, the overwhelming impression created by the legislative history of the 1978 Amend-

ments is that Congress intended to expand the remedies available under the Act."

CONCLUSION

The goal of eliminating discrimination against the handicapped is a laudable one, and one which congress has taken major steps to reach. The court today decides to turn its back on this goal. In so doing, the court flies in the face of the clear language of the Rehabilitation Act and the plain understanding and intent of Congress in enacting and amending that statute. I am therefore compelled to dissent.

FOOTNOTES

1. Rehabilitation Act of 1973 ["the Act"] section 505(a)(2), 29 U.S.C., section 794a(a)(2), as amended by Comprehensive Rehabilitation Services Amendments of 1978 ["the 1978 Amendments"], section 120 (a).

2. "[Trageser] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of [section 504], regardless of the designated use of the Federal funds received by the employer in question." S.Rep.No. 316, 96th Cong., 1st Sess. 13 (1979).

3. Comment: Commenters suggested that under [Trageser] the Department has no authority to accept or resolve employment discrimination complaints under Section 504.
Response: The Guidelines reflect the Department's current interpretation of its authority. If and when it must be revised to conform to controlling judicial decisions, the new policy will be announced and will supersede the Guidelines.
Comments and Recommendations on Proposed Guidelines [now codified at 45 C.F.R. Part 84, Appendix B (1980)], 44 Fed. Reg. 17168, 17174 (1979).
These guidelines deserve special deference. They were developed in response to Executive Order 11914 (1976), which directed the Secretary of HEW to coordinate the implementation of section 504 by all federal departments and agencies and directed those departmental agencies to "issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary

of Health, Education and Welfare." The coordinating function was transferred from HEW to the Attorney General by Executive Order 12250 (1980), which revoked Executive Order 11914.

4. As of 1980, the Attorney General was assigned responsibility for coordinating the enforcement of section 594 by federal departments and agencies. Executive Order 12250 (1980). See footnote 3, supra. In his analysis of rules promulgated under this authority, see 28 C.F.R. sections 42.501-.540 (1980), the attorney general stated that

> HEW has construed section 504 to prohibit employment discrimination against handicapped persons in all programs receiving Federal financial assistance ... . Several courts have construed section 504 to cover employment discrimination... . To date, two courts of appeals have taken a narrower view. See in Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1976), cert. den., 442 U.S. 947 [99 S.Ct. 2895, 61 L.Ed.2d 318] (1979); Carmi v. Metropolitan St. Louis Sewer District, No. 79-1325, [620] F.2d [672] (8th Cir. May 6, 1980)... .
>
> The [Trageser] court's decision appears to rest solely on the language of section 120(a) of the Rehabilitation Act Amendments of 1978, which provides that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available" to persons aggrieved because of section 504 violations. Accordingly, "in the absence of legislative history to the contrary," the court held that section 120(a) of the Rehabilitation Act Amendments of 1978 incorporated the limitations of Title VI coverage as to employment discrimination. Id. at 89.

The court, in its analyasis, did not focus on the remedial purpose of section 504 to provide broad protections to handicapped persons. Nor did the court consider the legislative histories of the Rehabilitation Act of 1973 and its subsequent amendments, which reflect the continuing congressional concern for the employment problems of handicapped persons. See, e.g., S.Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); H.R. Rep.No. 95-1149, 95th Cong., 2d Sess. 16,18, 23-29, 34, 38, 42-43 (1978); S.Rep.No. 95-890, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978). Further, the legislative history of section 120(a), which apparently was not brought to the attention of the court, indicates that the provision was not intended to limit the scope of section 504, but was merely a legislative ratification of HEW's enforcement procedures under section 504.

Section 120(a) was originally a provision in S. 2600 (95th Cong., 2d Sess., section 118(a) (1978)) the Senate version of the Rehabilitation Amendments of 1978 reported by the Senate Committee on Human Resources on May 15, 1978. The Committee stated, with respect to section 120(a):

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies and rights under section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement. (Sen.Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).) (Emphasis added).

> In view of the legislative history of the Rehabilitation Act of 1973 and its amendments, HEW's administrative construction, the remedial nature of section 504 and the legislative history of section 120 (a), the Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance, and the Department's proposed regulations reflect this view (sections 42,510-42,513).

Nondiscrimination Based on Handicap in Federally Assisted Programs - Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980). The analysis goes on to note that in view of Trageser and Carmi, the provisions relating to employment would not be enforced within the Fourth and Eighth Circuits unless the primary objective of the federal funding is employment. Id.

5. E.g., Comment, Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action? 54 N.Y.U.L.Rev. 1173 (1979).

6. (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies... . (3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

45 C.F.R. section 84.11 (1977). The part applies to "each recipient of Federal financial assistance from the Department of Health, Education and Welfare and to each program or activity that receives or benefits from such assistance." Id. section 84.2. There is no provision limiting the application of section 84.11 to programs where the purpose of the Federal funding is employment. These regulations were not altered in response to the 1978 amendments. See 45 C.F.R. sections 84.2, 84.11 (1980).

7. Indeed, the Tenth Circuit recently noted: "Every court of appeals and district court, and there have been many, which have considered this question have held that a private right of action exists under the statute." (sic) Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1377 (10th Cir. 1981) (collecting cases).

8. The Trageser court states in its opinion that "Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." 590 F.2d at 89 (footnotes omitted). One of the cases cited does hold that the section 604 limitation applies to private actions under Title VI. Quiroz v. City of Santa Ana, 18 FEP Cases 1138, 1140 (C.D. Cal. 1978). It offers no reasoning or authority in support of this conclusion. Furthermore, that case merely dismissed the complaint with leave to amend. Since the plaintiff was a CETA worker, his complaint could easily have been amended to avoid the issue altogether.

The other cases cited by the Trageser court do not support its assertion.

9. Other courts have known better. The Eighth Circuit observed in Simon v. St. Louis County, Mo., 656 F.2d 316, 319 n.6 (8th Cir.1981), that Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 674-75 (8th Cir. 1980), which follows the reasoning and adopts the holding of Trageser, "limited what had been construed to be a broader private right of action under section 504... ." Id.

10. Civil rights statutes are to be construed as broadly as their language permits. Griffin v. Breckinridge, 403 U.S. 88,97, 91 S.Ct. 1790, 1796, 23 L.Ed.2d 338 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437, 88 S.Ct. 2186, 2202, 20 L.Ed.2d 1189 (1968).

11. See note 8, supra. For cases holding that Title VI provides a private right of action see Cannon v. University of Chicago, 441 U.S. 677, 696-97 & 696 nn.20,21, 99 S.Ct. 1946, 1957-58 & 1957 nn. 20, 21, 60 L.Ed. 2d 560.

APPENDIX B

ORDER.

In the United States District Court for the Central District of California.

Douglas James Scanlon, plaintiff, vs. Atascadero State Hospital, California Department of Mental Health, defendants. No. CV 79-4523 MRP..

Filed: January 30, 1980.

Plaintiff herein alleges a cause of action under Section 504 of the Rehabilitation Act of 1973, as amended, 20 U.S.C. § 794, together with pendent state claims based on California Labor Code § 1420 and California Government Code § 11135, for employment discrimination on the basis of handicap. On January 28, 1980, the motion of defendants Atascadero State Hospital and California Department of Mental Health to dismiss the complaint under Rule 12(b) came on for hearing. After consider-

ing the papers submitted and hearing oral argument, the Court concludes that the plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution and that the complaint must be dismissed in its entirety.

In this discussion, consideration must first be given to the plaintiff's claim under 20 U.S.C. § 794. With respect to that claim, the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against states and their agencies. Alabama v. Pugh, 438 U.S. 781 (1978). Suits against a state brought by its own citizens are included within this prohibition. Edelman v. Jordan, 415 U.S. 651, 662-63 (1973). Congress may waive this immunity by authorizing suit against the state under a specific statute. However, waiver will be found "only where stated by

the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Edelman at 673.

Thus, the Court must examine section 794 to determine if there has been a waiver by Congress of the state's Eleventh Amendment immunity. An examination of section 794(a), which was added by amendment in 1978, is also required for the same purpose. That section provides that, "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance ... under section 794 of this title."

Careful analysis of both sections leads the Court of conclude that there

is no evidence of Congressional intent to waive the Eleventh Amendment immunity for suits brought under section 794 or Title VI which is sufficient to meet the standard articulated in Edelman, supra, Stemple v. Board of Education, 464 F.Supp. 258, 262 (D.Md. 1979); Stubbs v. Kline, 463 F.Supp. 110, 115-16 (W.D.Pa. 1978). There is no support for plaintiff's contention that the state defendants have consented to being sued in federal court by receiving federal assistance, Edelman at 673, or by agreeing to conform to federal law as a condition of the receipt of assistance. Therefore, the Eleventh Amendment operates as a bar to suit against the state agencies on the federal claim.

Defendants have argued as a second ground for dismissal that a suit for employment discrimination under

29 U.S.C. § 794 must allege that the primary objective of the federal assistance received by defendants is to provide employment. Although plaintiff has not so alleged, the Court finds this argument unpersuasive. Hart v. County of Alameda, 21 Fair Empl. Prac. Cases 234 (N.D.Cal. 1979).

With respect to the claims under state law, the same analysis must be applied as in the case of the federal claim Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946). There is no evidence before this court that the state has consented to suit against it in the federal court for violation of California Labor Code § 1420 or for California Government Code § 11135. The state may consent to suit in its own courts without consenting to suit against it in the federal courts. Kennecott, supra.

In the opinion of this Court, the Eleventh Amendment bars the pendent state claims which also must be dismissed. Alternatively, having decided that the federal claim must be dismissed, the Court exercises its discretion to dismiss the pendent claims. United Mineworkers v. Gibbs, 383 U.S. 715 (1966). Accordingly, for the reasons stated above,

IT IS ORDERED that defendants' motion to dismiss the complaint is granted.

Dated: January 30, 1980

/s/ Mariana R. Pfaelzer
UNITED STATES
DISTRICT JUDGE

APPENDIX C

ORDER.

In the United States Court of Appeals for the Ninth Circuit.

Douglas James Scanlon, plaintiff, vs. Atascadero State Hospital, California Department of Mental Health, defendants. No. 80-5201.

Filed: September 22, 1982.

Before: DUNIWAY and FERGUSON, Circuit Judges, and KELLAM,* District Judge.

A majority of the members of the panel that decided this case, Judges Duniway, Ferguson, and Kellam, has voted to deny the petition for a rehearing. Judge Ferguson has voted to grant the petition for a rehearing. An active judge of this court has called for a vote on the suggestion of a rehearing in banc and a vote has been held. Less than a majority of the active judges of the court have voted to

grant a rehearing in banc.

IT IS ORDERED that the petition for a rehearing is denied and the suggestion of a rehearing in banc is rejected. The mandate shall issue forthwith.

---

*The Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX D.

1. Section 504 of Title V of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978 provides:

> No otherwise qualified handicapped individual in the United States, as defined in § 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary

to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted, to such committees.

2. Section 505(a)(2) and (b) of Title V of the Rehabilitation Act of 1973, added by Section 120 of Title I of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794a(a)(2) and (b), provides:

> The remedies, procedures, and rights set forth in Title VI of the

Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under § 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

3. Section 604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3, provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any

employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Supreme Court, U.S.
FILED
DEC 30
ALEXANDER L. STEVAS

No. 82-5812

In the Supreme Court of the United States

OCTOBER TERM, 1982

DOUGLAS JAMES SCANLON,

Petitioner,

v.

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE DEUKMEJIAN, Attorney General
of the State of California
THOMAS E. WARRINER,
Assistant Attorney General
ANNE S. PRESSMAN
JAMES E. RYAN,
Deputy Attorneys General
3580 Wilshire Boulevard, Suite 800
Los Angeles, California 90010
Telephone: (213) 736-2279
Attorneys for Respondents

Westside Law Publishers Santa Monica, California (213) 450-1965

QUESTIONS PRESENTED

1. In a private action claiming employment discrimination under section 504 of the Rehabilitation Act of 1973, is it an essential element thereof that the federal financial assistance alleged to have been received by the employer be for the primary purpose of providing employment?

2. Does the immunity provided by the Eleventh Amendment to the United States Constitution bar actions against states and their agencies under section 504 of the Rehabilitation Act of 1973?

3. Must the plaintiff in a private action under section 504 of the Rehabiltation Act of 1973, in which he or she alleges discriminatory practices by a recipient of federal financial assistance, also allege and demonstrate that there exists a programmatical nexus between the assistance and the discriminatory practice?

RELATED CASE

A petition for writ of certiorari is currently pending in another case before this Court which presents the same issue as that stated above as No. 1 under Questions Presented. *Le Strange v. Consolidated Rail Corp.*, Docket No. 82-862, petition filed November 22, 1982.

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No. 82-5812

In the Supreme Court of the United States

OCTOBER TERM, 1982

DOUGLAS JAMES SCANLON,

Petitioner,

v.

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Atascadero State Hospital and California Department of Mental Health[1] herewith present their Brief In Opposition and respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's decision in this case.

---

[1] Respondent Atascadero State Hospital is a corporation created by statute which is under the jurisdiction and control of respondent Department of Mental Health. (California Welfare and Institutions Code section 4100 *et seq.*)

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 677 F.2d 1271 and is also reprinted in Appendix A to the petition. The opinion of the District Court is unreported but is set forth in Appendix B to the petition.

JURISDICTION

Petitioner asserts jurisdiction for review under 28 U.S.C. § 1254(1). Respondents in Argument II *infra* urge that jurisdiction over these respondents is lacking for reasons of sovereign immunity.

STATEMENT OF THE CASE

Petitioner's complaint alleges that he is a handicapped individual who in 1978 applied for but was denied employment in a specific position with respondent Atascadero State Hospital. He asserts that said respondent declined to hire him because of his handicaps. (Complaint, ¶ ¶ 8-11, 26.)

He also alleges that both of the respondents are recipients of federal financial assistance. (Complaint, ¶ ¶ 4-5.) The complaint does not, however, describe the nature of that assistance, its purpose, or what connection, if any, that assistance bore to the program or employment position for which petitioner had applied.

The complaint purports to state a claim pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; see Appendix D to petition, pp. 39-40) and on pendent state grounds, under which petitioner seeks declaratory, injunctive and monetary (back pay) relief.

Respondents moved to dismiss the action on two grounds: (1) that they were immune from suit in federal court in private actions under section 504 by reason of the

Eleventh Amendment to the United States Constitution; and (2) that petitioner had failed to allege an essential element of a claim under section 504, to wit, that the federal assistance allegedly received by respondents was for the primary purpose of providing employment.

The District Court, while rejecting the second stated grounds, granted respondents' motion on the basis of the Eleventh Amendment defense.

The Court of Appeals, on the other hand, accepted the premise of the second grounds and affirmed the order of dismissal on that basis, thus never reaching the sovereign immunity question. In so ruling, the Ninth Circuit adopted the holding in *Trageser v. Libbie Rehab. Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. den.* 442 U.S. 947 (1979).

The *Trageser* decision, and those of subsequent Circuits, held that the claimant in a section 504 action must plead and demonstrate that the federal financial assistance received by the alleged discriminatory employer was for the purpose of providing employment. This conclusion was reached by the *Trageser* court upon a reading and analysis of the relevant provisions of both the Rehabilitation Act and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*).

Section 505(a) (2) (29 U.S.C. § 794a(a) (2); see Appendix D to petition, pp. 40-41) incorporates the remedies, procedures and rights set forth in Title VI for purposes of actions pursuant to section 504 of the Act. One such provision of Title VI precludes actions thereunder except where a primary objective of the federal financial assistance is to provide employment. (42 U.S.C. § 2000d-3; see Appendix D to petition, pp. 41-42.) *Trageser* and the Circuit decisions embracing it found that this limitation on Title VI actions applied, as well, to claims under section 504 of the Rehabilitation Act.

In that the complaint at issue here makes no allegation as to the purpose of the federal financial assistance received by respondents, the Court of Appeals below affirmed the dismissal of the action on these statutory grounds, finding it unnecessary to decide the constitutional question regarding states' immunity. For the reasons stated in the Argument portion of this brief, respondents suggest that a resolution of this *Trageser* rule does not avail petitioner because there exist other independent and valid defenses to the action which he cannot overcome. In such circumstances, the instant petition for writ of certiorari is in the nature of a request for an advisory opinion.

SUMMARY OF ARGUMENT

Although petitioner couches the issue which he seeks to be reviewed in the form of three different questions, there is essentially only one question which he has presented. It can be stated as follows: In a private action claiming employment discrimination under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), is it an essential element thereof that the federal financial assistance alleged to have been received by the employer be for the primary purpose of providing employment?

While the foregoing issue is raised as a result of the Ninth Circuit opinion below, respondents contend that a resolution in petitioner's favor on this question would not alter the result reached by both of the lower courts in this case. This is so because, first, the claim of respondents to immunity under the Eleventh Amendment, which was the basis for the District Court's dismissal of this action, but which was not an issue reached by the Ninth Circuit, remains a valid defense to the entire action. *Cory v. White*, _____ U.S. _____, 102 S.Ct. 2325, 72 L.Ed. 2d 694 (1982).

In addition, there has emerged in recent cases an element, independent from that framed in the petitioner's question above, which must be alleged and demonstrated before a cognizable claim under section 504 of the Rehabilitation Act will be deemed to have been stated. This principle requires that there be a programmatical nexus between the program for which assistance is received and the program as to which the claimant alleges discrimination. *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982).

Respondents further suggest that this Court's recent adoption of the same requirement in analogous circumstances under Title IX of the Civil Rights Act of 1964 confirms the requisite nature of this element of program specificity. *North Haven Bd. of Ed. v. Bell*, _____ U.S. _____, 102 S.Ct. 1912, 72 L.Ed. 2d 299 (1982). In that case the Court held that termination of an offending recipient's financial assistance by the federal agency is "limited to the particular entity and program in which such noncompliance has been found." *Id.*, 102 S.Ct. at 1926. Respondents contend that, to similar effect, the plaintiff in a private action under the Rehabilitation Act must allege and demonstrate a programmatical nexus between the program receiving assistance and the program in which discrimination is claimed.

When the allegations of petitioner's complaint are tested against this latest requirement it is seen that the pleading is fatally defective. As with the sovereign immunity defense, resolution of the question presented by petitioner again would not insulate this action from dismissal on other valid grounds.

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Court Should Deny The Petition Because There Exist Independent Grounds For Dismissal Of The Underlying Action

The proceedings in this matter extended no further than the filing of petitioner's complaint and the granting of respondents' motion to dismiss. It is against the bare allegations of that complaint, taken as true, that one must test whether petitioner has brought a viable claim under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).

Petitioner urges review by this Court essentially on the grounds that there exists a conflict in the Circuits concerning one possible essential element of a claim under section 504. In connection therewith, petitioner contends that those Circuits are in error which have concluded that the plaintiff in a section 504 action must allege and demonstrate that the subject defendant is a recipient of federal financial assistance which has as its primary purpose the providing of employment.

Respondents oppose the instant petition for the reason that resolution of the perceived conflict in the Circuits will not validate petitioner's action for reasons, other than that just described, which appear from the face of the complaint. Consequently, even if petitioner were to prevail on the question(s) he has presented, his action below would still be fatally defective and subject to dismissal. A grant of certiorari, under these circumstances, then, would not appear to be warranted. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

II.

The Eleventh Amendment To The United States Constitution Bars Actions Under Section 504 Of The Rehabilitation Act Of 1973 Against States And Their Agencies

As noted at pages 5-6 of the petition, the Court of Appeals did not reach the constitutional issue, which was the grounds relied upon by the District Court in its dismissal of this action. It is submitted by respondents that this jurisdictional grounds, i.e. sovereign immunity under the Eleventh Amendment to the United States Constitution, remains a separate and valid defense to the underlying action. As such, whatever may be the merits of petitioner's statutory argument with respect to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the eventual result would still be the same.

A restatement of respondents' constitutional defense is germane at this juncture. Only recently this Court reaffirmed the rule that states and their agencies are absolutely immune from suit in federal court by reason of the Eleventh Amendment to the United States Constitution. *Cory v. White*, _____ U.S. _____, 102 S.Ct. 2325, 72 L.Ed. 2d 694 (1982).

In that case the plaintiff contended that the State of California could not avail itself of the jurisdictional bar of sovereign immunity because the underlying action sought only prospective equitable relief against the state and, as such, the immunity recognized in *Edelman v. Jordan*, 415 U.S. 651 (1974), would not apply. In agreeing with respondent's argument, the Fifth Circuit Court of Appeals was not the first to misconstrue the *Edelman* opinion as holding that Eleventh Amendment immunity inures only when private parties seek to impose a liability which must be paid from public funds in the state treasury.

This Court granted certiorari in the *Cory* case in order to dispel any confusion concerning the breadth of the immunity under the Eleventh Amendment as to actions both at law and in equity. The Court held the span of that protection to be as follows:

> "*Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought. The Eleventh Amendment reads, 'The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, . . . ' Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition." *Cory v. White*, _____U.S._____, 102 S. Ct. at 2329, 72 L.Ed.2d at 699. (Footnote omitted.)

Thus, the underlying action here (which does not seek any form of relief against state *officials* or other individuals) is properly vulnerable to an Eleventh Amendment immunity bar as enunciated in *Cory*. This, of course, was the basis for the dismissal of the action by the district court and remains a viable defense today.

Petitioner has argued below that any sovereign immunity which might appear to be available to the states has been abrogated by Congress with respect to actions under section 504 of the Rehabilitation Act. Any claim of abolition of sovereign immunity, however, will be considered with the most stringent circumspection. The test is set forth in *Edelman v. Jordan, supra*, 415 U.S. at 673:

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)."

Neither the Rehabilitation Act of 1973, nor the relevant 1978 amendment thereto (29 U.S.C. § 794a), contains the requisite express language or manifests any implication that states were being stripped of their sovereign immunity under the Act. Where Congress *does* intend to abrogate states' immunity it knows how to expressly provide for same and, in fact, has done so. (*See, e.g.*, the definition of "persons" under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e(a)].)

It should be emphasized that every case which has considered sovereign immunity in the context of the Rehabilitation Act has held that defense to be a valid one. *Miener v. State of Mo.*, 673 F.2d 969, 980-983, (8th Cir. 1982), *cert. den.*, _____ U.S. _____, 103 S.Ct. 215 (1982); *Parks v. Pavkovic*, 536 F.Supp. 296, 311 n. 27 (N.D. Ill. 1982); *Riley v. Ambach*, 508 F.Supp. 1222, 1248 (E.D. N.Y. 1980), rev'd on other grounds, 668 F.2d 635 (2d Cir. 1981); *Hark v. School Dist. of Philadelphia*, 505 F.Supp. 727, 731 (E.D. Pa. 1980); *Jones v. Illinois Dept. of Rehabilitation Services*, 504

F.Supp. 1244, 1257 (N.D. Ill. 1981); *M.R. v. Milwaukee Public Schools*, 495 F.Supp. 864, 867 (E.D. Wisc. 1980); *Stemple v. Board of Ed. of Prince George's Cty.*, 464 F.Supp. 258, 262 (D. Md. 1979), aff'd on other grounds, 634 F.2d 893 (4th Cir. 1980), *cert. den.*, 450 U.S. 911 (1981); *Stubbs v. Kline*, 463 F.Supp. 110, 115-116 (W.D. Pa. 1978).

Moreover, in those cases listed above where the court also traced the history of the Act in response to an argument that the states' immunity had been *abrogated* or *waived*, in each instance the court found no merit to such a contention. *Miener v. State of Mo.*, *supra*; *Riley v. Ambach*, *supra*; *M.R. v. Milwaukee Public Schools*, *supra*; *Stemple v. Board of Ed of Prince George's Cty.*, *supra*.

Petitioner, however, has suggested in previous briefs that, because the Rehabilitation Act was enacted pursuant to the enforcement provisions of section 5 of the Fourteenth Amendment, there is a less strict test in examining the issue of abrogation than that quoted above in *Edelman*. The basis for this suggestion of a different standard is petitioner's misreading of the decisions in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Hutto v. Finney*, 437 U.S. 678 (1978).

Fitzpatrick involved a discrimination claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) against the Director of Connecticut's State Employees Retirement System in which plaintiff sought, *inter alia*, retroactive retirement benefits. The Court ultimately found that under Title VII, enacted pursuant to the Fourteenth Amendment, Congress had abrogated states' immunity. This result was not reached, however, as has been suggested by petitioner, merely through an analysis of legislative history aimed at determining an intent to subject states to suit. Rather, in the first instance, the

Court found that " 'The threshold fact of congressional authorization' . . . to sue the State as employer is clearly present."[2] *Fitzpatrick v. Bitzer, supra,* 427 U.S. at 452.

Thus, it is clear that the Court in *Fitzpatrick* conducted its analysis of legislative intent only *after* first satisfying itself as to the "express language or overwhelming implication" standard set forth in *Edelman*. This interpretation of the holding in *Fitzpatrick* comports with this Court's subsequent analysis of that decision in *Quern v. Jordan*, 440 U.S. 332, 343-344 (1979), where it was stated:

> "Our cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother Brennan is able to marshal. In *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973), the Court concluded that Congress did not lift the sovereign immunity of the States by enacting the Fair Labor Standards Act of 1938, 29 U.S.C. § § 201-219, because of the absence of any indication 'by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.' 411 U.S., at 285. In *Fitzpatrick v. Bitzer* the Court found present in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the 'threshold fact of

[2] 42 U.S.C. § 2000e(a), as mentioned earlier in this brief, explicitly includes "governments, governmental agencies and political subdivisions" within its definition of "person" under Title VII.

> congressional authorization' to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments . . . ."

In *Hutto v. Finney, supra*, this Court held that the Eleventh Amendment was not an impediment to the awarding of attorneys fees under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) in an underlying 42 U.S.C. § 1983 action. Finding that the award only involved an item of "expenses incurred in litigation," and since "costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity," the Court did not reach or reject the *Edelman* test on abrogation. *Hutto v. Finney, supra*, 437 U.S. at 695.

This appraisal of the limited application of *Hutto* is confirmed in *Quern v. Jordan, supra*, 440 U.S. at 344-345 n. 16:

> "While *Hutto*, unlike *Fitzpatrick* and *Employees*, did not require an express statutory waiver of the State's immunity, 437 U.S., at 695, 698 n. 31, the Court was careful to emphasize that it was concerned only with expenses incurred in litigation seeking prospective relief while the other cases involved retroactive liability for prelitigation conduct." (Footnote omitted.) *Accord, Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7.

Respondents submit, therefore, that *Fitzpatrick* and *Hutto* do not establish any new test, peculiar to legislation enacted pursuant to section 5 of the Fourteenth Amendment, for determining whether sovereign immunity has been abrogated. Rather, the standard for such an inquiry remains that pronounced by this Court in *Edelman v. Jordan, supra*, 415 U.S. at 673.

Employing the *Edelman* test, there is neither any "express language" nor "overwhelming implication" which can be derived from the texts of the statutes here involved that counsels a construction favoring abrogation under the Rehabilitation Act.[3] Moreover, even accepting the proposition that said Act was passed pursuant to section 5 of the Fourteenth Amendment and the argument that a test less strict than that in *Edelman* applies, the legislative history of the Rehabilitation Act indicates no intent to abrogate states' immunity. (*See, Miener v. State of Mo., supra*, 673 F.2d at 980; *Parks v. Pavkovic, supra*, 536 F.Supp. at 311 n. 27.)

In concluding this argument, respondents respectfully submit that the Eleventh Amendment immunity remains a valid defense to the instant action and for this reason the petition for writ of certiorari should be denied.

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[3]29 U.S.C. § 794a(a) (2) incorporates for the purposes of the Rehabilitation Act those remedies provided under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*). It is noteworthy that those cases which have considered the Eleventh Amendment in a Title VI context have upheld the states' immunity. *See*, e.g., *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979); *Sagan v. Com. of Pa.*, 542 F.Supp. 880, 881 (W.D. Pa. 1982).

III.

The Underlying Action Remains Subject To Dismissal Because Of Petitioner's Failure To Satisfy The Requirement That There Is A Nexus Between The Program Receiving Federal Assistance And The Program In Which Occurred The Alleged Discrimination

At the time respondents moved in the District Court to dismiss the complaint herein they expressly recognized that litigation under the Rehabilitation Act of 1973 was in an "embryonic stage." The existence of a private remedy under section 504 was just beginning to be acknowledged[4] and the requisite elements for asserting a proper claim thereunder were yet to be established.

One case which did address the issue of what constitutes a cognizable claim under section 504 was *Trageser v. Libbie Rehab. Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. den.*, 442 U.S. 947 (1979). That case held that since section 505(a)(2) of the Rehabilitation Act (29 U.S.C. § 794(a)(2)) incorporates the "remedies, procedures and rights" available to plaintiffs under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), the limitation found at section 604[5] of the latter Act attaches as well to section 504 actions. As a result, *Trageser* held

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[4]Since then (1979), nine different Circuits have accepted the viability of a private remedy under section 504. *See*, most recently, *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376 (11th Cir. 1982); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981); and the remaining Circuit cases collected in *Pushkin, id.* at 1377.

[5]Section 604 (29 U.S.C. § 2000d-3) is reprinted in Appendix D of the petition. In cogent part, it literally precludes agency action against federal assisted employers except where a primary objective of the funding is to provide employment.

that a private action under section 504 "may not be maintained unless a primary objective of the federal financial assistance is to provide employment." *Id.*, 590 F.2d at 89.

In the case at bar the District Court rejected the holding in *Trageser*. The Ninth Circuit, of course, adopted it. In the few years subsequent to the *Trageser* decision several other Circuits have addressed the same issue. Those additional Circuits which have held that the primary purpose of the federal financial assistance at issue must be to provide employment in order for a claim to be stated by a private party under section 504 are: the *Second* (*United States v. Cabrini Medical Ctr.*, 639 F.2d 908 (1981)); and the *Eighth* (*Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (1980), *cert. den.*, 449 U.S. 892 (1981)).

To the contrary, two Circuits have refused to apply the restriction found in section 604 of Title VI to private actions under the Rehabilitation Act: the *Third* (*Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767 (1982), U.S. App. Pndg. (No. 82-862)); and the *Eleventh* (*Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376 (1982)).

Petitioner refers to and contrasts the above decisions in positing that there exists a clear conflict among the Circuits on this "standing" issue, a conflict which he urges should be resolved by the granting of certiorari herein. The treatment of this question by the Circuits, however, has not been as dichotomous as petitioner would make it out to be.

In reaching its conclusion regarding the materiality of the purpose of the federal funding at issue in section 504 actions, the *Trageser* court observed:

> "Thus, because of § 604, Title VI does not provide a judicial remedy for employment dis-

> crimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." *Trageser v. Libbie Rehab. Center, Inc., supra*, 590 F.2d at 89. (Footnotes omitted.)

The opinion in *Trageser* thereupon proceeded to conclude that "we must apply the limitation contained in § 604 of Title VI to § 504 of the Rehabilitation Act." *Id.*, 590 F.2d at 89. In summarizing its holding, however, the court mentioned only the first of the above-quoted two limitations derived from section 604 as constituting an essential element of a section 504 claim. *Id.*.

It is *that* portion of the *Trageser* and *Carmi* opinions, which requires that federal funds be employment-related, with which the contrary *Le Strange* and *Jones* decisions (and also the dissent below) disagree. The language, legislative history and administrative treatment of the relevant statutes, including not only the Rehabilitation Act, but Titles VI and IX (20 U.S.C. § 1681 *et seq.*) as well, have been exhaustively surveyed by courts on both sides of the issue[6] and will not be recounted at this stage.[7] Those analyses, suffice to say, have led the courts to differing results as to the necessity for plaintiffs to plead and prove an employment objective of the federal funds at issue.

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[6] *See*, e.g., *Carmi v. Metropolitan St. Louis Sewer Dist., supra*, 620 F.2d at 674-675. *Compare, Le Strange v. Consolidated Rail Corp., supra*, 687 F.2d at 769-776.

[7] Since respondents assert that the petition herein should be denied because the underlying action is deficient in other respects, this brief will not attempt to argue the merits of the holding below and its reliance on the doctrine established in *Trageser*. That effort would seem to be best reserved for future briefing should certiorari be granted.

On the other hand, there has emerged at the same time a consensus among the Circuits respecting a different prerequisite to § 504 actions. Specifically, a claimant, even if he or she is an employee who alleges discrimination by an employer which receives any form of federal financial assistance, must allege and show that there is a nexus between the program receiving federal assistance and the program in which occurred the alleged discrimination.

In *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982), this rule finds its most recent and expositive declaration:

> "Doyle's claim under § 504 of the Rehabilitation Act of 1973 is premised on the proposition that the University of Alabama was under a federally enforceable duty not to discriminate against her on the basis of her handicap simply because it was a recipient of federal funds. There is no question that the University of Alabama, a multi-program entity, receives federal funds for some of its programs. But this fact alone does not subject the entire university to liability under § 504. The District Court dismissed the § 504 on the grounds that Doyle did not specifically allege that she was an employee of a program that benefited from federal funds. After the District Court rendered its decision, the former Fifth Circuit, in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981) held, after a careful analysis of the language and legislative history of § 504, that 'it is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A

> private plaintiff in a section 504 case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance. (footnotes omitted)' *Brown v. Sibley*, 650 F.2d at 769. Since Doyle does not allege that the program by which she was employed was 'directly benefited by federal financial assistance,' her § 504 claim was correctly dismissed." *Id.*, 680 F.2d at 1326-1327.

It should be noted that in *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981), quoted above, the court posited this requirement "on the basis of the language of section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX."

In *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1232 (7th Cir. 1980), the same point was phrased as follows:

> "The statute (section 504) does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.
>
> "The parties have not cited us to any discussion of § 504 in the legislative history which might shed further light on this issue. Neither has our research revealed any extensive consideration

> of the point in the committee reports which accompanied the adoption of § 504 in the Rehabilitation Act of 1973 and the further changes added by the Rehabilitation Act Amendments of 1974 and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. However, there is certainly nothing in the brief references to § 504 in the committee reports which precludes the restriction of recovery under the section to persons directly or indirectly benefiting from the federal financial assistance in question. In fact, these references support our interpretation that to be actionable the alleged discrimination must be in connection with a federally funded program or activity." (Footnote omitted.) (Insert added.)

Lastly, in *Jones v. Metropolitan Atlanta Rapid Transit Authority, supra,* 681 F.2d at 1382, where the court expressly rejected *Trageser* and its progeny, the opinion cites with approval both the *Doyle* and *Brown* decisions concerning this separate nexus requirement.

It is significant to note that in arriving at this standing prerequisite these cases did not rely on an application of section 604 of Title VI to section 504 remedies. Nor did they reach their conclusion due to any adherence to the *Trageser* rationale. Rather, for the most part, it was felt that such a construction was compelled by the very language of section 504 itself, which bears repeating here:

> "No otherwise qualified handicapped individual . . . shall . . . be excluded from *the participation in*, be denied *the benefits of*, or be *subjected to discrimination under* any program or activity receiving Federal financial assistance . . ." (Emphases added.)

Had Congress intended that a recipient of federal assistance be subject to private actions notwithstanding the absence of any nexus between the program receiving the assistance and the program with which the potential claimant is involved, it simply could have written or amended section 504 to read:

> "No qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity [*by any recipient of*] Federal financial assistance . . ."

To have so phrased section 504, of course, would have been inconsistent with the prohibitory language which is found in Title VI (29 U.S.C. § 2000d) and Title IX (20 U.S.C. § 1681), after which section 504 is supposedly patterned.[8]

The recent decision of this Court in *North Haven Bd. of Ed. v. Bell*, _____ U.S. _____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), supports this analysis. The principal focus of the Court's attention in that case was directed toward determining whether Title IX proscribes employment discrimination in federally funded programs, irrespective of the fact that the primary purpose of such funds may not have been to provide employment. This Court's resolution of that issue, however, did not end its inquiry.

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[8]It is also noteworthy that the relevant administrative regulations, unlike a previous unsuccessful effort at expanding the scope of section 504 (*Southeastern Community College v. Davis*, 442 U.S. 397 (1979)), make no attempt at broadening or otherwise modifying this standing or nexus prerequisite. (*See*, e.g., 45 C.F.R. § § 84.4, 84.11.)

Expressing a restriction in terms of "program specificity," the Court held that termination of an offending recipient's financial assistance by the federal agency is "limited to the particular entity and program in which such noncompliance has been found." *Id.*, 102 S.Ct. at 1926. This constraint on the scope of governmental action was found by the Court to be compelled from a reading of the relevant Title IX statutes and regulations. Specifically, the prohibitory language of section 901(a) of Title IX, which is nearly identical to section 504 of the Rehabilitation Act, was held to be program-specific; and the adoption in the Title IX regulations of case law applying a program-specific restriction on termination of Title VI funds was found to be consistent with such an interpretation of the statute. *Id.*, 102 S.Ct. at 1926.

The *North Haven* treatment concerning the permissible breadth of *agency* action against Title IX assistance recipients provides a template from which can be drawn the manner in which this Court would define the breadth of *private* actions pursuant to Title IX and the Rehabilitation Act.[9] In this regard, respondents submit that the Court's "program-specific" restriction respecting agency action is the parallel concept to the "program nexus" limitation recognized by the courts in private actions. In each area the courts have required that there be a *programmatical* connection between the discrimination or noncompliance, on the one hand, and the identity of the federal assistance, on the other.

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[9]Not only are the statutes, section 901(a) of Title IX and section 504 of the Rehabilitation Act, virtually identical in their program-specific language, but the regulations implementing section 504 incorporate the very Title VI procedures and sanctions adopted under Title IX and which this Court found persuasive in *North Haven*. The regulation under section 504 which incorporates the Title VI regulations is found at 45 C.F.R. § 84.61. The incorporating regulation under Title IX is 34 C.F.R. § 106.71. The subject Title VI regulations are at 45 C.F.R. §§ 80.6-80.11.

Thus, a federal recipient is not to be subjected to the prospect of losing its funding *in toto* or as to certain programs, or be subjected to potential private liability with respect to such programs, where the alleged noncompliance or discrimination occurs in other unrelated programs.

Our next reference, then, is to the allegations of the complaint at issue. As described by petitioner at page 4 of his petition, he has alleged that respondents were the recipients of federal financial assistance and refused to hire petitioner for a specific job position. No reference is made in the complaint as to the nature of the assistance received or the program or activity to which it related. Nor is there any assertion in the pleading that there was any connection between the program giving rise to the job for which petitioner had applied and the program under which respondents received assistance.

Given this state of the pleadings, petitioner finds himself in the same position as that of the plaintiffs in *Doyle v. University of Alabama In Birmingham, supra,* 680 F.2d at 1327, and *Simpson v. Reynolds Metals Co., Inc., supra,* 629 F.2d at 1231-1232, wherein the courts affirmed dismissal of the actions for a similar pleading defect.

Once again, then, as with the sovereign immunity issue addressed *supra*, it is seen that a grant of certiorari, and even a resolution in petitioner's favor on what can be termed the *Trageser* rule, does not save petitioner's day. His action would still be properly subject to dismissal under the immunity grounds and/or the standing or nexus grounds just articulated, on which issues there is no conflict in the Circuits.

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
THOMAS E. WARRINER,
Assistant Attorney General
ANNE S. PRESSMAN
JAMES E. RYAN,
Deputy Attorneys General
Attorneys for Respondents

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on December 30, 1982, I served the within *Respondents' Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fullv prepaid, in the United States mail at Santa Monica, California, addressed as follows:

U.S. Supreme Court
1 First St., N.W.
Washington, D.C. 20543
(Original and 40 copies)

Marilyn Holle
Daniel Brzovic
Western Law Center for
the Handicapped
849 South Broadway
Suite M-22
Los Angeles, California 90014

Mary-Lynne Fisher
Loyola Law Clinics
1441 West Olympic Blvd.
P.O. Box 15019
Los Angeles, Ca. 90015-3980

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 30, 1982 at Santa Monica, California.

Kirk W. Harney
Original signed